Velocity Express, Inc., formerly known as Corporate Express Delivery Systems *and* Teamsters Local 886, a/w International Brotherhood of Teamsters, AFL–CIO, CLC. Case 17–CA–20076–1

August 31, 2004

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On December 19, 2000, the Board issued its Decision and Order finding that the Respondent unlawfully discharged employees Edwin and Hildegard Kirk for engaging in union activity, and ordering the Respondent to reinstate the employees and make them whole for any loss of earnings and benefits resulting from the discharge.[1] On August 8, 2002, the Board's order was enforced by the United States Court of Appeals for the District of Columbia Circuit.[2] Subsequently, the Regional Director issued a compliance specification setting forth the amount of backpay due each of the discriminatees. The Respondent then filed an answer asserting that the backpay calculations were inaccurate and denying that any backpay was due.

A hearing on the issue of backpay was held on July 22, 2003, before Administrative Law Judge John J. McCarrick. On September 30, 2003, the judge issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the Respondent's exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

I.

The Respondent is in the business of providing same-day delivery and related services. Edwin and Hildegard Kirk were employed by the Respondents as drivers, and owned the vehicles they operated on their delivery routes. They were paid a regular salary, from which the Respondent deducted expenses for vehicle insurance and pagers. The Kirks were responsible for all expenses related to the operation of their vehicles, including gasoline and repairs.

After having been discharged by the Respondent in March 1999, Edwin Kirk was self-employed until early in 2002, at which time he took a job that paid an hourly wage. Hildegard Kirk was employed during the backpay period at a job paying an hourly wage. The record contains no specific evidence regarding the nature of their interim employment.

The compliance specification covers the period from the Kirks' discharge in March 1999 through the end of 2002. The compliance officer calculated backpay in the compliance specification for both discriminatees by deducting the following from gross backpay: (1) expenses for insurance and pagers normally deducted by the Respondent; (2) severance pay; (3) estimated out-of-pocket expenses related to the operation and maintenance of vehicles;[3] and (4) interim earnings. With regard to the portion of the backpay period during which Edwin Kirk (Kirk) was self-employed, the compliance officer calculated his net interim earnings by subtracting business expenses, based on gross mileage deductions on tax returns, from gross receipts.

The judge found that the compliance officer's backpay formula appropriately included deductions for interim earnings, severance pay, and expenses for pagers and insurance. However, the judge determined that the deductions for estimated out-of-pocket vehicle expenses from the gross backpay figures were not appropriate, and revised the backpay formula to exclude the deductions for those expenses. For reasons set forth below, we adopt the judge's formula.

II.

In determining the amount of backpay owed a discriminatee, the Board may use any formula that will approximate what the discriminatee would have earned absent the discrimination, if the formula is not unreasonable or arbitrary in the circumstances. *Performance Friction Corp.*, 335 NLRB 1117 (2001) (and cases cited therein).[4] Here, we find that the formula proposed by the

[1] 332 NLRB 1522 (2000).

[2] 292 F.3d 777 (D.C. Cir. 2002).

[3] This estimate was based on the Kirks' representation of what their expenses would have been had they continued to work for the Respondent, including expenses for gasoline, repairs, tires, oil changes, and van washes.

The General Counsel cautioned at the hearing that the Kirks' out-of-pocket expenses from gross backpay were voluntarily placed in the compliance specification, and were not based on any affirmative burden on the General Counsel to do so. Any effort on the part of the compliance officer to mitigate gross backpay amounts is done as a public service, and does not serve to supplant the normal burdens in a compliance proceeding. See, e.g., *Folk Chevrolet, Inc*., 176 NLRB 277, 279 (1969).

[4] We agree with the judge that the General Counsel has the burden of demonstrating the gross amount of backpay due the backpay claimants. *Hansen Bros. Enterprises*, 313 NLRB 599, 600 (1993); *Mastro Plastics Corp.*, 136 NLRB 1342, 1346 (1962).

judge accurately reflects the wages that the discriminatees would have earned—i.e., what they would have been paid by the Respondent—had they not been discharged unlawfully.

The Respondent, however, argues that the judge's backpay formula is not reasonable because it does not account for the expenses the discriminatees would have paid out of their wages, which the Respondent claims should be deducted from the gross backpay figure. We find no merit in this argument. It has long been established that the Board does not deduct from gross backpay those expenses that employees would have incurred had they not been unlawfully discharged. See *Laborers Local 38 (Hancock-Northwest)*, 268 NLRB 167 (1983), enfd. in relevant part 748 F.2d 1001 (5th Cir. 1984); *East Texas Steel Castings Co.*, 116 NLRB 1336, 1342 (1956), enfd. 225 F.2d 284 (5th Cir. 1958), clarified 281 F.2d 686 (5th Cir. 1960); *Myerstown Hosiery Mills*, 99 NLRB 630, 631 (1952). In *Hancock-Northwest*, the Board held that the respondent unions were not entitled to a credit against gross backpay for expenses—including transportation, lodging, and meals—that the discriminatees would have incurred had they worked for the employer during the backpay period. In that case, as here, the employees were personally responsible for certain expenses, the expenses were integral to their employment, and the employees deducted those expenses on their Federal tax returns. 268 NLRB at 169–170. Further, the Board rejected the respondents' argument, similar to that of the Respondent and our dissenting colleague, that a failure to allow a credit for such expenses against gross backpay would result in a windfall for the discriminatees.[5] We find that nothing in the circumstances presented here compels a different result.

We also agree with the judge that the compliance officer properly calculated Kirk's net interim earnings by deducting operating expenses from gross earnings for that portion of the backpay period during which he was self-employed. As the judge has observed, this is the standard method used to determine net interim earnings for discriminatees who are self-employed during the backpay period. See NLRB Casehandling Manual, Part Three, Section 10541.3. Moreover, the parties have stipulated that Kirk's net interim earnings, as set forth in the compliance specification (including the deductions), are accurate.[6] Thus, we adopt the backpay formula recommended by the judge to be used to calculate the backpay amounts owed the claimants.

III.

Our dissenting colleague contends that Edwin Kirk's gross backpay should be reduced by the amount of the vehicle-related expenses he would have incurred had the Respondent not discharged him.[7] Our colleague argues that because Kirk's *interim earnings* were reduced by the business expenses Kirk incurred during the period in which he was self-employed, Kirk would receive a windfall unless his *gross backpay* is analogously reduced. We disagree. The dissent's simple equation of the two types of expenses in this case is inconsistent with well-established principles for calculating an employer's backpay liability and unsupported by the record.

First, as we have shown, Board precedent is clear: expenses that an employee would have incurred, had he not been unlawfully discharged, are *not* deducted from gross backpay. There was no error, then, in failing to deduct from Kirk's gross backpay the expenses he claimed on his tax returns while employed by the Respondent.

That Kirk incurred interim expenses after his discharge does not affect the ultimate calculation of backpay liability, at least under the present circumstances, because the Respondent has failed to establish the facts necessary to support the sort of reduction advocated by our colleague.

The Board's rule is that expenses incurred in connection with interim employment may be deducted from interim earnings, if they exceed the expenses that the employee would have incurred had he not been discharged. See *Hancock-Northwest*, 268 NLRB at 170. See also *East Texas Steel Castings*, 116 NLRB at 1341–1342. Here, there is no issue with respect to the amount of interim expenses: the Respondent has stipulated that the net interim earnings set forth in the compliance specification are accurate. Thus, there would be a basis for reducing the Respondent's backpay liability only if Kirk's interim expenses were, in fact, less than the expenses he incurred while employed by the Respondent (in which case, they could not be deducted from interim earnings).

To enable this calculation, however, it was the Respondent's burden to prove with particularity that the two types of expenses are comparable. See *Ryder System*, 302 NLRB 608 (1991) (employer failed to adequately separate amounts in two categories of expenses, meals and travel, so that expenses could be separately calculated

[5] On appeal, the court also rejected the respondent's windfall argument and enforced the Board's backpay order.

[6] We agree with the judge that the General Counsel appropriately relied on Edwin Kirk's tax returns in determining his interim earnings. See *Kansas Refined Helium Co.*, 252 NLRB 1156, 1159 (1980), enfd. 683 F.2d 1296 (10th Cir. 1982).

[7] Our colleague would calculate such deductions based on the amount of work-related expenses that Kirk claimed on his tax returns while employed by the Respondent. He concedes that Hildegard Kirk's backpay should be calculated without any deductions for her out-of-pocket vehicle expenses.

with specificity). This specific rule follows from the general rule that the Respondent, as the wrongdoer, must establish any facts that would negate or mitigate its backpay liability. See, e.g., *Hansen Bros. Enterprises*, 313 NLRB 599, 600 (1993); *Florida Tile Co.*, 310 NLRB 609, 610 (1993), enfd. mem. 19 F.3d 36 (11th Cir. 1993).

The Respondent has failed to carry its burden. The record simply does not permit the sort of calculation with respect to expenses that might reduce the Respondent's backpay liability. As to the period prior to Kirk's discharge, the record contains specific evidence of Kirk's out-of-pocket vehicle expenses as estimated by the compliance officer, itemized on a quarterly basis as to gas, oil changes, repairs, tires, and van washes.[8] The record also contains figures of the aggregate amount of expenses deducted from Kirk's interim earnings, as stipulated by the parties and based on gross mileage figures set forth in tax returns. But with respect to Kirk's interim employment, the record does *not* reveal the specific nature of that employment or the specific expenses that Kirk incurred during this period, other than a passing reference to Kirk's use of standard mileage rates on his income tax returns during the first partial year of the backpay period. The only evidence regarding Kirk's interim employment proffered by the Respondent was Kirk's 1999 tax returns indicating that he was employed by DSI-Oklahoma City for a portion of that year in some undefined capacity, with a partially illegible notation as to mileage.

Further, the Respondent presented no evidence whatsoever regarding Kirk's interim employment and expenses for the remainder of the backpay period from 2000 through the end of 2002. Even as to 1999, the Respondent has failed to provide evidence that would allow a meaningful comparison for expenses that year, either by its failure to establish the nature of Kirk's interim employment or by its failure to show the exact nature of Kirk's expenses during that employment. See *Ryder System*, supra.

Consequently, the record provides no basis for balancing Kirk's interim expenses against expenses he would have incurred had he continued to work for the Respondent. In the absence of specific evidence of Kirk's interim expenses, adopting the backpay formula proposed by the judge does not result in either a "punishment" of the Respondent or a windfall to Kirk, as the dissent contends. It is the Respondent that has failed to introduce relevant evidence to mitigate its backpay obligation; therefore, it is the Respondent that must bear the consequences of that failure. Thus, we affirm the backpay awards as recommended by the judge.

[8] Because, under established law, it was improper for the compliance officer to deduct *any* business expenses from gross backpay, we need not address our colleague's argument that the compliance officer should have based these deductions on Kirk's income tax returns rather than estimated expenses.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Velocity Express, Inc., Oklahoma City, Oklahoma, its officers, agents, successors, and assigns, shall make whole the individuals named below by paying them the amounts following their names, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws:

Edwin Kirk	$136,818.13
Hildegard Kirk	12,000.27
Total	$148,818.50

Dated, Washington, D.C. August 31, 2004

Wilma B. Liebman,, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting in part.

For the reasons stated by the judge, I agree with my colleagues that the backpay of Hildegard Kirk should be calculated based on her average weekly rate for 1999, and not at the lower rate for the route to which she was assigned shortly before her unlawful discharge. I also agree with the judge and my colleagues that the gross backpay for Edwin and Hildegard Kirk should be adjusted to subtract the insurance and pager payments they would have paid to the Respondent had they not been terminated.

I dissent from my colleagues' failure to further adjust Edwin Kirk's gross back pay by additionally subtracting the operating expenses that Kirk would have incurred had the Respondent not discharged him.

It is well settled that the purpose of backpay is to make discriminatees whole for the losses that they sustain as a result of unlawful action taken against them. The purpose is not to punish the respondent. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940). "The make-whole statutory scheme established by the Act is exclusively remedial. The Board may not use its processes to punish anyone." *Kenmore Contracting Co.*, 303 NLRB

1, 5 (1991), enfd. mem. 888 F.2d 125 (2d Cir. 1989). Nor should backpay improperly enrich the discriminatees, i.e., place them in a better position than they would have enjoyed if discrimination had not occurred. *Master Appliance Corp.*, 164 NLRB 1189, 1190 (1967); *Taracorp Industries*, 273 NLRB 221, 223 (1984).

In determining backpay owed, perfection is not mandated. Reasonableness, and not exactitude, is all that is required. See, e.g., *Crimpi Transport*, 266 NLRB 1054 (1983). The Board is charged with selecting a backpay formula that is appropriate to the circumstances of the particular case. *United Aircraft Corp.*, 204 NLRB 1068 (1973). Thus, the backpay formula selected must reasonably approximate the amount which the employee would have earned but for the discrimination against him. Further, where there is a dispute as to the appropriate backpay formula, the judge is to choose the "most accurate formula," e.g., the formula that best captures the likely amount of wages lost due to the illegal termination. *NLRB v. Pepsi Cola Bottling Co. of Fayetteville*, 258 F.3d 305, 314 (4th Cir. 2001).

Applying these legal principles, I find that the backpay formula that most closely approximates what Kirk would have earned but for Respondent's discrimination against him is the amount he would have been paid by the Respondent if he had he not been discharged, minus the operating expenses that he would have incurred if he had not been discharged.

Kirk was employed by the Respondent as a "same-day" delivery driver. In this capacity, Kirk was paid a flat fee from which he reimbursed the Respondent for insurance and pager costs, and from which Kirk covered the other costs of his employment (e.g., gas, vehicle maintenance, etc.).[1] As recognized by the judge at the hearing, the amount of Kirk's flat fee was not the same as the net amount that he derived from his employment.

My colleagues would not deduct operating expenses from gross backpay. They say that these operating expenses are the same as expenses for transportation, lodging and meals. In cases where the employee travels to a fixed jobsite, the Board does not deduct from gross backpay the expenses incurred in traveling to and from the jobsite or for lodging and meals near that jobsite. By contrast, in the instant case, the expenses were incurred *in performing the work, i.e., driving the truck*. Thus, to take a hypothetical, a driver is paid $100 flat fee for driving a truck. From this $100, he must pay for $20 gas, oil, etc. He winds up with $80 in his pocket. In my view, if he is discharged, the employer must pay him $80, not $100.

Interestingly, when calculating interim earnings, my colleagues *do* deduct operating expenses. The result is to decrease the amount of interim earnings and to increase the Respondent's liability. I agree. But, if operating expenses are to be used for this purpose, it would seem equitable and rational to use such expenses to reduce gross backpay.

My colleagues argue that there is a difference between operating expenses as an offset from interim earnings and operating expenses as an offset from gross earning. I agree that the operating expenses incurred in connection with interim employment are not necessarily the same as operating expenses incurred in connection with employment with the Respondent. However, it does not follow that there should be no offset at all for operating expenses that would have been incurred but for the discharge. In the instant case, we know from Kirk's 1998 tax returns the amount of expenses that he claimed for 1998, the last full year in which he was employed by the Respondent. That figure is a percentage of his gross pay for that year. I would draw the inference that the percentage would have remained the same for later years, and I would use the resultant dollar figure to reduce gross backpay.

Dated, Washington, D.C. August 31, 2004

Robert J. Battista, Chairman

[1] As noted above, the insurance and pager costs are not at issue herein. My colleagues and I agree that, in determining backpay, these costs are to be deducted from the flat fee. The other costs (gas, vehicle maintenance, etc.) are referred to herein as operating expenses, and they are at issue herein.

NATIONAL LABOR RELATIONS BOARD

Mary Taves, Esq., for the General Counsel.
Terry L. Potter, Esq. (Blackwell, Sanders, Peper, Martin LLP), of St. Louis, Missouri, for Respondent.
Eddie Landers, Organizer, of Oklahoma City, Oklahoma, for Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried before me in Oklahoma City, Oklahoma, on July 22, 2003, upon the compliance specification issued by the Regional Director for Region 17 of the National Labor Relations Board (Board). On December 19, 2000, the Board issued its Decision and Order[1] directing, inter alia, that Respondent make whole Joseph Bennett,[2] Edwin Kirk, and Hildegard Kirk for any loss

[1] *Corporate Express Delivery Systems*, 332 NLRB 1522 (2000).

[2] At the hearing the parties offered a stipulation consenting to installment payment schedule approved by the Acting Regional Director

of earnings or other benefits suffered as a result of the discrimination against them. Thereafter on August 8, 2002, the United States Court of Appeals for the District of Columbia Circuit issued its judgment[9] enforcing the Board's Decision and Order. Having been unable to reach an agreement with the Board concerning the amount of backpay due to the above-named discriminatees, Respondent, Charging Party, and the Regional Director for Region 17 entered into a stipulation on January 18, 2003, that provided the only issue was the amount of backpay due to the three discriminatees. On February 26, 2003, the Regional Director for Region 17 issued the compliance specification[3] and on March 19 Respondent filed its answer to the compliance specification and denied that any of the discriminatees are due backpay.

The principal issues presented for decision are whether the General Counsel's gross backpay formula is reasonable and whether Respondent proved any of its affirmative defenses.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties, I make the following

Findings and Conclusions

1. The underlying unfair labor practice case

Respondent has been engaged in providing same day delivery services in Oklahoma City, Oklahoma. Respondent employed both owner/operators and so called company drivers in its delivery system.

In its December 19, 2000 decision, the Board adopted the findings and conclusions of Administrative Law Judge Pargen Robertson that Respondent unlawfully discharged its employees Joseph Bennett, Edwin Kirk, and HIldegard Kirk.

As a result, the Board's Order requires Respondent to offer reinstatement to and make whole Bennett and the Kirks.

2. The General Counsel's gross backpay formula

Robert Fetsch (Fetsch), Region 17 compliance officer, testified that he prepared the compliance specifications. Amendments to the compliance specifications were necessary as additional information was provided at various times before and during the hearing.

Fetsch testified that the beginning of the backpay period for each of the discriminatees was based on the administrative law judge's finding that they were unlawfully terminated on March 9, 1999. The backpay period for the discriminatees ended the first week of October 2002 with the offer of reinstatement letters from Respondent dated October 3, 2002.

For Edwin Kirk, Fetsch used Kirk's most recent weekly base pay of $760 together with his weekly freight rate of 254.40 to calculate his weekly salary of $1014.40. Fetsch used the same formula to calculate Hildegard Kirk's weekly salary. However, Fetsch did not use Hildegard's $380 weekly base pay at the time of her termination. Fetsch felt it was more equitable to use Hildegard's 1999 average $591.25 weekly rate since her weekly rate had been reduced to $380 only a week before her termination. There is evidence that in the past Respondent had reassigned Hildegard to a more lucrative route on her request. After her reduction in pay just before her termination, Hildegard requested reassignment to the higher paying route. Her manager, Carol Miller, told Hildegard that it would not be a problem to add something to her route to get it back to where Hildegard originally had been. However, Hildegard was terminated before Respondent could act upon her request.

The Board found the discriminatees were employee owner/operators of Respondent. As owner/operators, the discriminatees were responsible for certain expenses that were deducted from their compensation by Respondent. Since these expenses were built into the discriminatees' compensation, the Region concluded that an accommodation had to be made for all related employment expenses. Fetsch testified that those expenses included vehicle and related expenses. Both Edwin and Hildegard Kirk testified concerning their estimates of various expenses including van payments, gasoline, oil changes, repairs, tires, van washes, insurance, and pager expenses. Fetsch testified that the Region chose not to use the standard deduction for business expenses the Kirks claimed on their tax returns to calculate gross backpay because to do so would have left the Kirks with little or no backpay and would not represent the actual state of their take home pay with Respondent. In calculating the Kirk's employment expenses while employed with Respondent, Fetsch took estimated annual expenses for each expense category from the Kirks and prorated those over calendar quarters or partial calendar quarters. Van payments were not deducted to compute gross backpay since the Kirks continued to incur these expenses after they were terminated. Similarly, expenses the Kirks continued to incur after their terminations were not deducted from gross backpay, including auto taxes and license fees. Van insurance was calculated by deducting the difference between the amount paid while working for Respondent and the lesser amount of insurance obtained in interim employment.

In calculating interim earnings, Fetsch testified that the amounts claimed by the Kirks on their Federal Income Tax returns for business expenses were used to calculate interim expenses to offset interim earnings that resulted in net interim earnings.[4] There is no dispute concerning the accuracy of the amounts used to compute interim earnings.

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for Region 17 on July 21, 2003, that provides Respondent has agreed to make whole Joseph Bennett in the sum of $34,000 to be paid in 12 equal installments commencing July 25, 2003, in full settlement of Bennett's backpay claims in this case. GC Exh. 2.

[9] D.C. Circuit No. 01–1058, unpublished memorandum filed June 11, 2002.

[3] At the hearing counsel for the General Counsel amended the backpay specification by offering revised appendixes B-1 and B-2 which reflect adjustments to gross backpay for Edwin Kirk and Hildegard Kirk for the first quarter of 1999. GC Exh. 3.

[4] Interim expenses were calculated for Edwin Kirk using his Federal Income Tax Return Schedule C, which utilized a standard mileage deduction since Edwin was self-employed. No interim expenses were found for Hildegard Kirk as her interim earnings came as an hourly employee.

3. Analysis

A. Applicable Legal Principals

It is well settled that the finding of an unfair labor practice is presumptive proof that some backpay is owed, *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966), and that in a backpay proceeding the sole burden on the General Counsel is to show the gross amounts of backpay due—the amount the employees would have received but for the employer's illegal conduct. *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 544 (1943). Once that has been established, "the burden is upon the employer to establish facts which would . . . mitigate that liability." *NLRB v. Brown & Root*, 311 F.2d 447, 454 (8th Cir. 1963). It is further well established that any formula which approximates what discriminatees would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary in the circumstances. *Iron Workers Local 378 (Judson Steel Corp.)*, 227 NLRB 692 (1977); *NLRB v. Brown & Root*, supra at 452; *East Texas Steel Castings Co.*, 116 NLRB 1336 (1956), enfd. 255 F.2d 284 (5th Cir. 1958); *Avon Convalescent Hospital*, 219 NLRB 1210, 1213 (1975). In this regard, the Board has stated that "it is for the [administrative law judge] to consider whether the General Counsel's formula is the proper one in view of all the facts adduced by the parties and to make recommendations to the Board as to the most accurate method of determining the amounts due." (Emphasis supplied.) *American Mfg. Co. of Texas*, 167 NLRB 520. The Board has long recognized the value of utilizing social security records and income tax returns in determining interim income, and has found that "poor record keeping, uncertainty as to memory, and perhaps exaggeration" do not automatically disqualify an employee from receiving backpay. *Pat Izzi Trucking Co.*, 162 NLRB 242, 245 (1966), enfd. 395 F.2d 241 (1st Cir. 1968).

B. The Gross Backpay Formula

It is well established that any formula which approximates what discriminatees would have earned had they not been discriminated against is acceptable and need not attain mathematical precision as long as it is not arbitrary or unreasonable. *Boyer Ford Trucks*, 270 NLRB 1133, 1138 (1984; *Iron Workers Local 378 (Judson Steel Corp.*), 227 NLRB 692 (1977).

Both the Board and the administrative law judge found that the owner/operator discriminatees herein were responsible for certain expenses that were deducted from their pay including insurance on their vehicles, pager expenses, uniforms, drug tests and physical exams. Neither the Board nor the administrative law judge found that vehicle expenses, other than insurance, were deducted from the discriminatees' compensation.

I find that the gross backpay formula used for the Kirks was not reasonable. The Board found the Kirks were employees not self-employed independent contractors. The goal of a backpay proceeding is to determine what the discriminatees would have earned had they not been discriminated against. The novel approach utilized by the Region in deducting expenses incurred by the Kirks from gross backpay, over and above that which Respondent deducted for insurance and pagers, is similar to the calculation used for determining interim earnings for self employed discriminatees.[5] It is inappropriate to use a profit and loss approach to calculating gross backpay for discriminatees in the instant case, particularly where the Board found the discriminatees, "have no proprietary interest in their routes and no significant opportunity for entrepreneurial gain or loss." *Corporate Express Delivery Systems*, supra at 1522. The only appropriate deductions from gross backpay were vehicle insurance and pagers, which Respondent automatically deducted from the Kirks paychecks, since this represents what the Kirks would have earned but for Respondent's discrimination.[6]

In calculating Hildegard Kirk's gross backpay, the Region utilized her 1999 average $591.25 weekly rate since Hildegard's weekly rate had been reduced to $380 only a week before her termination. I find this formula is reasonable. Respondent argues that there is no evidence to conclude that Hildegard Kirk would have been restored to her previous weekly rate of $591.25. However, there is evidence that Hildegard had previously been granted a requested route change and more importantly shortly before her termination, her supervisor had promised Hildegard that her route would be supplemented to get her back to where she had been originally. Given this promise and past practice, it is reasonable to assume Hildegard Kirk would have earned $591.25 per week if she had not been unlawfully terminated.

C. Interim Earnings

The Region offset interim expenses in computing interim earnings for Edwin Kirk. For at least a portion of the time Edwin had interim earnings they were the product of entrepreneurial self-employment. In calculating Edwin Kirk's interim earnings from self-employment, the Region used his Federal Income Tax return to determine both his earnings and his operating expenses. This is the standard method in calculating interim earnings from self-employment. NLRB Casehandling Manual Part Three-Compliance Proceedings section 10541.3. See also *Synergy Gas Corp*., 302 NLRB 130 (1991). Respondent contends that the standard deduction should have been used both to calculate interim earnings and gross backpay. This argument is fundamentally flawed since it assumes that both dwin and Hildegard Kirk were self-employed while working for Respondent. This argument has long been settled by both the Board and the Court of Appeals. Use of the standard deduction was appropriate to calculate Edwin Kirk's interim earnngs since he was self-employed during the backpay period. It would be inappropriate, as noted above, to use the

[5] Inexplicably the Region reasoned that it would not deduct vehicle payments from gross backpay since the discriminatees continued to incur these expenses after they were fired. Using this rationale all vehicle expenses, including gas and oil, tires, vehicle washes, and repairs, should be excluded since they were presumably incurred by the Kirks after their terminations.

[6] The Region deducted the difference between what the Kirks paid Respondent for insurance and what they later obtained for insurance on their vehicles. This formula does not accurately represent the Kirks' compensation from Respondent. Since it is clear they were obligated to pay insurance from their paychecks, only the actual amount deducted from their pay accurately reflects their salary. The evidence shows that both Edwin and Hildegard Kirk paid Respondent $390 per quarter for insurance. The Kirks each paid $29.25 per quarter for pagers. GC Exhs. 7 and 8.

It would be inappropriate, as noted above, to use the expenses from the standard deduction to diminish the Kirk's gross backpay when they were Respondent's employees. Since Respondent was contesting only the formula for interim earnings and not their accuracy, I find that Edwin Kirk's interim expenses were appropriately determined.

D. The Backpay Period Ended October 3, 2002

The backpay period commenced with Respondent's unlawful terminations of Edwin and Hildegard Kirk on March 9, 1999. Respondent contends that the Kirks abandoned interest in working for Respondent. In support of this argument, Respondent offered the letters dated January 26, 2003, the Kirk's sent to Respondent declining offers of reinstatement.[7] In the letters the Kirks both state that they cannot accept offers of reinstatement since Bill Kennedy was still the site manager. Respondent reasons that the Kirks must have abandoned their jobs, since Kennedy has always been site manager and therefore earlier offers of reinstatement would likewise have been rejected. There is no evidence that before Respondent's October 3, 2002 offers of reinstatement, the Kirks in any way indicated abandonment of their jobs.

The Board has long held that employee's statements concerning their desire for reinstatement made prior to a valid offer of reinstatement are unreliable as an indicator of an employee's true interest in reinstatement. *Big Three Industrial Gas & Equipment Co.*, 263 NLRB 1189, 1203 (1982); *Lyman Steel Co.*, 246 NLRB 712, 714 (1979). Until a valid offer of reinstatement has been tendered, the discriminatee's intent cannot be discerned. While it is clear that the Kirks declined offers of reinstatement after October 3, 2002, there is no evidence of what their intent was prior to that time. I find no probative evidence that supports a conclusion the Kirks abandoned their jobs with Respondent prior to October 3, 2002.

On these findings of fact and conclusions of law, and on the entire record, and I issue the following recommended[8]

[7] See R. Exhs. 3 and 4.

[8] In the event no exceptions are filed as provided by Sec.102.46 of the Board's Rules and Regulations, the findings, conclusion, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

IT IS HEREBY ORDERED that Respondent, Velocity Express, Inc., formerly known as Corporate Express Delivery Systems, forthwith pay to each of the following persons backpay in the amounts set opposite their name, plus interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), as required by the Board's Order of December 19, 2000:

Edwin Kirk	$136,818.13
Hildegard Kirk	12,000.37
TOTAL NET BACKPAY	$148,818.50

Dated: September 30, 2003.